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# In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 338

CONRAD WOLFLE, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 139–143) is reported in 64 F. (2d) 566.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 10, 1933. (R. 143–144.) A petition for rehearing was denied June 19, 1933. (R. 144.) The petition for writ of certiorari was filed August 14, 1933, and was granted October 16, 1933 (R. 149), limited as hereinafter set forth. The jurisdiction of this Court is invoked under Section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

In granting certiorari this Court limited its review "to the question as to what law is applicable to the determination of the question of privilege which was raised at the trial." (R. 149.)

The record discloses that over the objection of the petitioner, who was on trial in a Federal court in the State of Washington for using the mails in furtherance of a scheme to defraud, his stenographer was permitted to read from her stenographic notes a letter dictated by the petitioner to his wife, which contained a statement from which the jury might draw an inference of criminal intent on the part of the petitioner.

## STATEMENT

Petitioner was convicted in the District Court of the United States for the Western District of Washington upon four counts of an indictment charging him with using the mails in furtherance of a scheme to defraud (R. 1–30, 53). The fraudulent scheme related to the promotion of a mining enterprise in Alaska. Petitioner was sentenced to imprisonment for four years on each of the counts upon which he was convicted, the terms of imprisonment to run concurrently, and to pay a fine of $250 on each count (R. 58). Upon an appeal to the Circuit Court of Appeals for the Ninth Circuit the judgment below was affirmed (R. 139–143).

With reference to the question presented for review in this Court, the record discloses that the Government called as a witness Mrs. Graee Snyder, petitioner's stenographer, and that she was permitted to read from her stenographic notes the contents of a letter, addressed to petitioner's wife, which petitioner had dictated to her (Mrs. Snyder) on or about June 15, 1929 (R. 93–97).[1] In this letter, which is set out in full at R. 91–92 and R. 95–96, the petitioner, after referring, among other things, to the condition of his health, made the following statement (R. 96):

> I told him [the petitioner's doctor] "All right, you leave your business and I will leave mine and we will go away together." He said he cannot do it; I says, "I cannot, either"—so, I will stay on the job, because this Cantu Mine, by God, has to be finished. It has been going very slow but we are all working and we are going to succeed. I talked to a banker the other day; he said "You have done as much as most people do in two years." He said "It is a hard time to break in" but I am going to break in and

[1] There is a statement in the petitioner's brief that the stenographic notebook which the stenographer used in taking notes of this letter was surreptitiously abstracted from her employer's office during his absence. (Br. 4.) While this, of course, would have no bearing upon the competency of the stenographer to testify as to the contents of the letter, we merely wish to say that we find no support in the record for petitioner's assertion. (See cross-examination of the stenographer, R. 97–106.)

> whenever I do, I am going to rob every last one of them blind, you bet your last bottom dollar.

Petitioner objected to the above testimony on the ground, *inter alia*, that the letter was a privileged communication between husband and wife and that its admission would be in violation of the statutes of the State of Washington, but the objection was overruled and petitioner noted an exception. (R. 94.) After the testimony was admitted petitioner moved that it be stricken and that the jury be instructed to disregard it. The court likewise denied this motion and petitioner was allowed an exception. (R. 97.) The action of the trial court in admitting this testimony was sustained by the Circuit Court of Appeals for the Ninth Circuit in a unanimous opinion. (R. 139–144.)

## ARGUMENT

### I

### THE LAW WHICH IS APPLICABLE IN DETERMINING THE QUESTION OF PRIVILEGE RAISED AT THE TRIAL IS THE LAW OF WASHINGTON AT THE TIME WASHINGTON WAS ADMITTED INTO THE UNION AS A STATE

In *Funk* v. *United States*, No. 394 of the present term, a Federal criminal case coming from North Carolina, which was argued in this Court on November 13th and 14th of this year and is now pending for decision, review was limited by this Court in granting certiorari "to the question as to what law is applicable to the determination of the competency of the wife of the petitioner as a witness."

In considering this question the Government in its brief discussed at length the pertinent decisions of this Court and reached the conclusion that, in the absence of a Federal statute upon the subject, the applicable law in determining the competency of a witness or the admissibility of testimony in a Federal criminal case is, so far as a case originating in one of the thirteen original states is concerned, the law of that state which was in force in 1789, when the courts of the United States were established by the Judiciary Act of that year (*United States* v. *Reid*, 12 How. 361; *Jin Fuey Moy* v. *United States*, 254 U.S. 189; *Barton* v. *United States*, 25 F. (2d) 967 (C.C.A. 4th), certiorari denied, 278 U.S. 621), but that so far as a case originating in a state admitted after 1789 is concerned, the applicable law is the law of that state which was in force at the time it was admitted into the Union. (*Logan* v. *United States*, 144 U.S. 263; *Hendrix* v. *United States*, 219 U.S. 79; *Olmstead* v. *United States*, 277 U.S. 438.)

In the *Olmstead* case, which arose in the same Federal District Court as the instant case, this Court said with reference to the contention that evidence obtained through the intercepting of telephone messages by government agents was inadmissible because the mode of obtaining it was unethical and a misdemeanor under a law of the State of Washington enacted in 1909 (pp. 466–468):

> While a Territory, the English common law prevailed in Washington and thus con-

tinued after her admission in 1889. The rules of evidence in criminal cases in courts of the United States sitting there, consequently are those of the common law. *United States* v. *Reid*, 12 How. 361, 363, 366; *Logan* v. *United States*, 144 U.S. 263, 301; *Rosen* v. *United States*, 245 U.S. 467; *Withaup* v. *United States*, 127 Fed. 530, 531; *Robinson* v. *United States*, 292 Fed. 683, 685.

The common law rule is that the admissibility of evidence is not affected by the illegality of the means by which it was obtained. * * *

* * * * *

The common law rule must apply in the case at bar.[2]

* * * * *

This statute [the statute of the State of Washington] does not declare that evidence obtained by such interception shall be inadmissible, and by the common law, already referred to, it would not be. *People* v. *McDonald*, 177 App. Div. (N.Y.) 806. Whether the State of Washington may prosecute and punish federal officers violating this law and those whose messages were intercepted may sue them civilly is not before us. But clearly a statute, passed twenty years after the admission of the State into the Union cannot affect the rules of evidence applicable in

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[2] If there had been a territorial statute upon the subject involved, and if that statute had continued in force when Washington was admitted as a State, that statute would, of course, have governed. *Cf.* the *Logan* case. See also last sentence of this quotation. on this page

courts of the United States in criminal cases, Chief Justice Taney, in *United States* v. *Reid*, 12 How. 361, 363, construing the 34th section of the Judiciary Act, said:

"But it could not be supposed, without very plain words to show it, that Congress intended to give the states the power of prescribing the rules of evidence in trials for offenses against the United States. For this construction would place the criminal jurisprudence of one sovereignty under the control of another." See also *Withaup* v. *United States*, 127 Fed. 530, 534.

The only exception to the rule announced in the above cases which has been recognized by this Court is that referred to in *Rosen* v. *United States*, 245 U.S. 467. In that case, which involved the competency of a convict to testify on behalf of the Government in a federal criminal case in New York, the contention was made that the convict was incompetent because under the common law as it was administered in New York in 1789, he would not have been permitted to testify. This Court, after referring to the modern rule, as revealed in both legislation and judicial decision, under which all persons of competent understanding are permitted to testify, leaving to the jury the question of the weight and credibility of their testimony, said (p. 471–472):

Satisfied as we are that the legislation and the very great weight of judicial authority which have developed in support of this

> modern rule, especially as applied to the competency of witnesses convicted of crime, proceed upon sound principle, we conclude that the dead hand of the common-law rule of 1789 should no longer be applied to such cases as we have here, and that the ruling of the lower courts on this first claim of error should be approved.

In the *Funk* case the Government contended in its brief that the *Rosen* decision was implicitly, if not expressly, limited to the particular disqualification with which the Court was there concerned and that the later decisions of this Court in the *Jin Fuey Moy* case and the *Olmstead* case expressly confirmed the view that the *Rosen* decision should not be regarded as abrogating the rule laid down in the *Reid* and *Logan* cases except to the extent mentioned.

It should also be noted that the *Rosen* case arose in one of the thirteen original states and not in a state admitted since 1789. For this reason we do not think that it may be regarded as a criterion in ascertaining the rule which is applicable in determining the competency or admissibility of testimony in a Federal criminal case originating in one of the newer states.

We submit, therefore, that the law which is applicable to the determination of the question of privilege which was raised at the trial of this case is the law of Washington which was in force at the time of the admission of Washington into the

Union.* That this was the rule applied below is evident from the opinion of the Circuit Court of Appeals. That court said (R. 140)

> The case at bar was tried in the United States District Court for the State of Washington, and in the absence of Federal legislation upon the subject the law of the territory of Washington at the time of her admission into the Union as a state controls in the trial of criminal cases in the Federal courts sitting therein. *Rendleman* v. *U.S.*, 18 F. (2d) 27; *Olmstead* v. *U.S.*, 277 U.S. 438, 466-7, 469; *Tinsley* v. *U.S.*, 43 F. (2d) 899, 895.

## II

### PETITIONER'S STENOGRAPHER WAS COMPETENT TO TESTIFY AS TO THE CONTENTS OF THE LETTER IN QUESTION

While this Court has limited its review to the question as to what law is applicable to the determination of the question of privilege which was raised at the trial, it may be of assistance to the Court in the disposition of the case for the Government to discuss on its merits the question of the competency of petitioner's stenographer to testify as to the contents of the letter in question.

At the time Washington was admitted as a State there was in force the following provision of the Code of 1881:

> SEC. 392. The following persons shall not be examined as witnesses:

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* The admission of Washington as a state was proclaimed by the President on November 11, 1889 (26 Stat. 1552.)

1. A husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband; *nor can either during marriage or afterwards, be without the consent of the other, examined as to any communication made by one to the other during marriage.* But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other." (Italics ours.)

[1] Section 388 of the Code provided that "Every person of sound mind, suitable age and discretion, except as hereinafter provided, may be a witness in any action, or proceeding," and Section 389 of the Code provided that "Any person offered as a witness shall not be excluded from giving evidence, by reason of his interest in the event of the action, as a party thereto, or otherwise, but such interest may be shown to affect his credibility; * * *."

[2] Section 24 of the Enabling Act for Washington, North and South Dakota, and Montana, approved February 22, 1889, c. 180, 25 Stat. 676, 681, provided that:

> all laws in force made by said Territories, at the time of their admission into the Union, shall be in force in said States, except as modified or changed by this act or by the constitutions of the States, respectively.

The constitution of the State of Washington, which was ratified by the people of that State on October 1, 1889 (Hill's Annotated Statutes and Codes of Washington, Vol. 2, p. 809), provided in Article XXVII, Sec. 2, that:

> All laws now in force in the territory of Washington which are not repugnant to this constitution shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature: * * *. [Hill, p. 853.]

While we have been unable to find any decisions by the Supreme Court of the Territory of Washington, prior to the admission of Washington as a state, construing that portion of the above statute which provides that neither spouse shall, during marriage or afterwards, without the consent of the other, be examined as to any communication made by one to the other during marriage, this provision has been carried without change into subsequent compilations of the laws of Washington and is still the law of that State. (Remington's Revised Statutes of Washington, Annotated, Vol. 3, Sec. 1214.) It has been the subject of construction by the highest court of the State of Washington. As the provision has of course the same meaning today as it had when originally enacted, the construction which the state's highest court has given it should, if not deemed controlling, be considered as, at least, highly persuasive.

With reference to the derivation of the statutory provision in question and the applicable decisions of the Supreme Court of the State of Washington construing the provision, as well as the decisions of the highest courts of other states in the same Federal judicial circuit concerning similar provisions in their statutes having a like origin, the court below said (R. 140–142):

> The statute of the territory of Washington on the subject of privileged communications between husband and wife was contained in § 392 of the Code of 1881 and is

now embodied in Hill's Statutes and Codes of Washington, § 1649. It was derived from a similar code section in the State of California (Cal. Code Civ. Proc., § 1881). That section of the California Code has been adopted in substantially the same form in all the states in this circuit (Oregon, § 733 Ore. Laws 1920; Arizona, § 4412 Struckmeyer's Rev. Code 1928; Nevada, § 5424 Rev. Laws Nevada, 1912; Idaho, § 7937, Idaho Comp. Stats. 1919; Montana, Rev. Code Mont. 1921, § 10, 536, and it has been uniformly held that the privilege does not extend to oral communications to third persons nor to written communications entrusted to or coming into the hands of third persons. With reference to these code sections thus adopted by the State of Oregon the Supreme Court of that state in *State* v. *Wilkins*, 72 Ore. 77, while recognizing that some courts have held that a written communication from the husband to the wife should be excluded as privileged "no matter into whose possession the communication, if in writing, may fall," also held that the authorities all agree that if oral communications between the husband and wife were overheard by third parties they may be given in evidence by the third party. The court also declined to follow the decisions of other states holding that the privilege extended to a writing between them which had come into the possession of third parties and decided that the purpose of the rule was to protect the speaker or writer from the testimony of

> the other spouse and that the privilege does not extend to communications when disclosed to strangers. The same view was expressed by the Supreme Court of the State of Washington in an earlier case, *State* v. *Nelson*, 39 Wash. 221. In *State* v. *Falsetta*, 43 Wash. 159, it was held that the rule concerning privileged communications between husband and wife had no application to the testimony of a third person who overheard such communication. See also *State* v. *Rasmussen*, 125 Wash. 176). The same rule has been followed in California (*People* v. *Chadwick* 4 Cal. App. 63, 72; *People* v. *Swaile*, 12 Cal. App. 192, 196). The same rule has also been followed in Arizona (*Chas. De Leon* v. *Territory of Arizona*, 9 Ariz. 161), and in Idaho as to communications between attorney and client (*State* v. *Perry*, 4 Idaho 224).

From the decisions of the Supreme Court of Washington referred to above, we think it is evident that the statute means precisely what it says, that neither spouse may be required to reveal testimonially any communication which is made to him or her by the other spouse during the marriage, but that the privilege does not preclude the testimony of a third person who has acquired knowledge of such a communication. Thus, in the *Nelson* case, 39 Wash. 221, the Supreme Court of Washington upheld the admission in evidence of a letter written by a wife to her husband, which had been introduced for the purpose of impeaching her testimony, because (p. 228):

> This letter was produced and offered in evidence by the officers of the state, and had therefore lost its character as a privileged communication. Underhill, Crim. Evid., p. 234; Wharton, Crim. Evid. (9th ed.), 398; *State* v. *Hoyt*, 47 Conn. 518, 36 Am. Rep. 89; *State* v. *Buffington*, 20 Kan. 599, 27 Am. Rep. 193; *People* v. *Hayes*, 140 N.Y. 484, 35 N.E. 951, 37 Am. St. 572, 23 L.R.A. 830.

This ruling was reiterated in the *Rasmussen* case, 125 Wash. 176, 180, which involved the production by a witness, who was neither the defendant nor his wife, of a letter written by the defendant to his wife, and in the *Falsetta* case, 43 Wash. 159,* the

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*While the court below in its opinion (quoted above on p. 13) stated erroneously that this case involved a privileged communication between husband and wife instead of between attorney and client, there can be no question that the court's ruling applies alike to both privileges. Both are provided for in the same section of the Washington Code (Code of 1891, sec. 392; Hill's Annotated Statutes and Codes of Washington, vol. 2, sec. 1649; Remington's Revised Statutes of Washington, vol. 3, sec. 1211), and the language employed with reference to privileged communications between attorney and client differs in no material respect from that used in connection with privileged communications between husband and wife. The paragraph of the code section dealing with the former privilege immediately follows that referring to privileged communications between husband and wife and reads as follows:

> 2. An attorney or counselor shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment.

court said with reference to the testimony of a witness who had overheard a conversation between an attorney and his client (p. 162):

> On cross-examination the state asked him if he did not state to his counsel in the court room in the presence of an officer of the court that he possessed a revolver at that time. On his denying the fact, the state put the officer on the stand and, over the objection of the appellant, he was permitted to testify that he had heard the appellant make such a statement. It is objected that this statement was a privileged communication between the defendant and his attorney, and that it was error to permit the officer for that reason to testify to it. But such is not the rule. Doubtless the attorney could not have been compelled to testify to the fact over the objection of the appellant, but the rule that precludes the attorney from testifying has no application to a third person who by accident or design overhears the communication. 23 Am. & Eng. Ency. Law (2d ed.), p. 72.

The Washington decisions are clearly in accord with the great weight of authority, whether the privilege be urged under the common-law rule or under modern statutes. See Wigmore on Evidence, 2d Ed., Vol. 5, Sec. 2336, pp. 89–90; Sec. 2339, p. 98; Sec. 2336, p. 77; Chamberlayne on Evidence, Vol. 5, pp. 5294–5296; Roscoe on Criminal Evidence, 13th Ed., p. 104; Jones on Evidence, 2d Ed., p. 920; Greenleaf on Evidence, 16th Ed., p. 392;

Phillips on Evidence, 5 Amer. Ed., p. 64, note (4); pp. 65–66; *Annotation to Nash* v. *Fidelity-Phenix Fire Insurance Co.* (106 W.Va. 672) appearing in 63 A.L.R., pp. 101, 108 *et seq.*, notes II and III; 28 Ruling Case Law, p. 528, par. 117; 40 Cyc. pp. 2358, 2359. See also *Dickerson* v. *United States*, 65 F. (2d) 824, 827 (App.D.C.), certiorari denied October 16, 1933 (No. 374); *United States* v. *Guiteau*, 1 Mackey (D.C.Rep.) 498, 548.

The basis of the Washington and other like decisions was well stated in *State* v. *Wilkins*, 72 Ore. 77, where the Supreme Court of Oregon said with reference to a provision in the Oregon statutes which is identical with that involved herein (pp. 80–82):

> It will be observed that the statutes are directed against the examination of either spouse as a witness, and not against communications between them, the knowledge of which is derived from independent sources. The authorities all agree that, if oral communications between husband and wife are overheard by third parties, they may be given in evidence from the mouth of the witness to whom they were thus imparted. It is not perceived that any difference in principle can exist because the communication is in writing and has fallen into the possession of strangers by whom it is disclosed. It must be admitted that the decisions are not uniform on this subject. Many precedents like *Gross* v. *State* (Tex. Cr. App.), 135

S.W. 373 (33 L.R.A. (N.S.) 477), maintain the rule that, if the statement is one about which the spouse cannot be examined as a witness, the shield of privilege is never laid aside, no matter into whose possession the communication, if in writing, may fall. Other cases, like *State* v. *Wallace*, 162 N.C. 622 (78 S.E. 1); *Connella* v. *Territory*, 16 Okl. 365 (86 Pac. 72); *People* v. *Swalle*, 12 Cal. App. 192 (107 Pac. 134); *People* v. *Dunnigan*, 163 Mich. 349 (128 N.W. 180, 31 L.R.A. (N.S.) 940); *O'Toole* v. *Ohio German Fire Ins. Co.*, 159 Mich. 187 (123 N.W. 795, 24 L.R.A. (N.S.) 802), forming in our judgment the weight of authority, establish the rule that if the communications in question, although in writing, are produced by third parties, even if secured surreptitiously, [they] are admissible in evidence, and the court will not concern itself about how possession of them was acquired. The reason of the rule is that it is necessary to preserve the trust that should ever exist between husband and wife, so that, if one spouse should make to the other a communication, the confidence thus reposed would remain as inviolable as though "in the deep bosom of the ocean buried," with the result that either may fearlessly make to the other a statement most vitally affecting the interests of the speaker or writer with the assurance of the law that the other will not be called upon to disclose the same. The essence of the rule seems to be the protection of the speaker or writer from the testimony

> of the other spouse. The shield is of no avail against such communications when disclosed by strangers. If either of the marital parties would enjoy the privilege, that one must take care that the secret does not become public.

See also *People* v. *Hayes*, 140 N.Y. 484, 495–496.

As the tendency of the privilege is to prevent the full disclosure of the truth, it should be strictly construed. *Lloyd* v. *Pennie*, 50 Fed. 4, 11 (N.D. Cal.); *Tutson* v. *Holland*, 50 F. (2d) 338, 340 (App, D.C.); *O'Toole* v. *Ohio German Fire Insurance Co.*, 159 Mich. 187, 193. The compelling of petitioner's stenographer to testify in this case as to the contents of the letter to petitioner's wife did not in anywise thwart the public policy upon which the doctrine of privileged communications between husband and wife is founded. It did not disturb, to use the language of the *Hayes'* case, "that mutual confidence between husband and wife which is the strongest guaranty of a happy marriage." It did not infuse reserve and dissimulation into that relationship, and it did not permit or require the wife to violate the confidence which her husband had the right to repose in her. The communication in the instant case was not made available to a third person through the connivance of the wife, and we are therefore not concerned with the conflicting decisions which bear upon the question as to whether, under such circumstances, the third person

may testify as to the contents of the communication. Here we have a case where a husband who is asserting the privilege imparted knowledge of an intended communication to his spouse, to one other than the spouse. We see no logical reason why the fact that the third person happens in this case to be the stenographer of the spouse making the communication and asserting the privilege takes the case out of the well-settled rule, as applied to oral communications, that one who overhears a communication between husband and wife, whether with or without their knowledge, and whether surreptitiously or openly, may testify regarding what he learns, or its well-established counterpart, as applied to written communications, that one who by accident or design and without the connivance of the addressee secures a communication between husband and wife, may testify with reference thereto.

It is undoubtedly true that a business man is entitled to repose confidence in his stenographers and clerks, but recognition of such a confidence is not necessary to preserve inviolate the confidential relationship between husband and wife which is the basis of the privilege here attempted to be asserted. That privilege is preserved if the spouse to whom the communication is made is forbidden either to testify or to place someone else in a position to testify as to the contents of the communication. What the petitioner here is really asserting is not

a privilege based on a confidential relationship existing between husband and wife, but a privilege based on a confidential relationship existing between a business man and his employee, and the simple answer to his contention is, we think, that the law has not yet seen fit to extend the doctrine of privileged communications to such a relationship, nor is the recognition of such a relationship needed to give full effect to the doctrine as applied to the relationship of husband and wife.

That the third person rule applies regardless of the closeness or intimacy of the relation between the person who overhears or acquires knowledge of a communication between a husband and wife and the spouse who makes the communication, finds ample demonstration in the cases. Thus, in *Hopkins* v. *Grimshaw*, 165 U.S. 342, 351, this Court said:

> Stephney Forrest's widow was neither a party to nor interested in this suit, having conveyed all her interest in the subject thereof to the defendant Grimshaw before the suit was brought. She was therefore incompetent to testify to private conversations between her and her husband in his lifetime; and a conversation between them in their own home, in the presence of no one but their young daughter, who does not appear to have taken any part in it, must be deemed to be

> a private conversation, within the rule. *Jacobs* v. *Healer*, 113 Mass. 157.
>
> *The daughter herself may have been a competent witness to such a conversation.* * * * (Italics ours.)

See also *State Bank* v. *Hutchinson*, 62 Kan. 9, involving the testimony of a daughter. In other typical cases the third person whose testimony was considered admissible was: A clerk in the defendant's store and a boarder at his home, who overheard an incriminating conversation between the defendant and his wife while the witness was in a room about ten feet from the bedroom of the defendant and his wife (*Nash* v. *Fidelity-Phenix Fire Insurance Co.*, 106 W.Va. 672); a wife's brother, in whose presence a conversation between husband and wife took place. (*Insurance Co.* v. *Shoemaker*, 95 Tenn. 72); a boarding-house mistress, who had eavesdropped at the door of a room at the boarding house in which a husband and wife were conversing (*Commonwealth* v. *Everson*, 123 Ky. 330); members of a son's family who had overheard a conversation between the son's father and his stepmother (*Martin* v. *Martin*, 267 Mass. 157); a fellow prisoner to whom the husband entrusted a letter for transmission to his wife, who occupied another cell in the same jail (*Commonwealth* v. *Smith*, 270 Pa. 583); the attorney of a libellant for divorce, where

it appeared that the libellant addressed a letter to her attorney directing him to dismiss an earlier libel brought by her, that the letter tended to contradict her testimony at the trial, that she showed the letter to her husband, and that she and her husband went with the letter to the office of his attorney, where she handed it to his attorney, by whose typist it was copied (*Drew* v. *Drew*, 250 Mass. 41, 45), the court saying—

> It was not a privileged communication with either her attorney or her husband because, if the testimony was believed, the original and the copy were shown by her to third persons. This destroyed her privilege concerning it—

a fellow prisoner to whom a husband dictated a letter to his wife (*State* v. *Young*, 97 N.J.L. 501, 505), the court saying—

> But the defendant further objects to the testimony because he claims it to be a confidential communication from husband to wife, and therefore privileged. The answer to this [the objection that the communication was privileged] is that it was not communicated to the wife, but to a third person, to be by him put in writing at the request of the defendant. Our statute provides, section 5 of "An act concerning evidence" (*Comp. Stat., p.* 2222): "Nor shall any husband or wife be compellable to disclose any confidential communication made by one to the other during marriage," and under it, to

> establish a privilege, based on the marital relation, the communication must be confidential and made by one to the other during marriage. To commit the communication to a third person to be transmitted to the wife, whether orally or in writing, destroys the element of confidence; nor is it a communication made by the husband to the wife. The communication to a third party under such circumstances amounts to a waiver by the husband of marital confidence such as the statute contemplates. The privilege is personal to husband and wife. "A third person who happened to overhear a personal conversation between husband and wife may be examined as to such conversation. A letter, also written confidentially by a husband to a wife, is admissible against the husband when brought into court by a third party." *Wharf. Cr. Ev.*, § 398; *Commonwealth* v. *Wakelin* (*Mass.*), 120 *N. E. Rep.* 209. The instant case is much stronger, for here the husband entrusted the communication to the witness to be reduced to writing, and no such privilege as is invoked exists. 28 R. C. L. 527, § 116.

The cases cited by the petitioner which hold that the privilege between attorney and client extends to an attorney's clerks, secretaries and stenographers are obviously not apposite. As Wigmore points out (Vol. 5, Sec. 2301, p. 40):

> The assistance of these agents being indispensable to his work, and the communi-

> cations of the client being often necessarily committed them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney's agents.

The same reasoning also, of course, applies to the necessary assistants of a physician, nurses, technicians, etc., but stenographers, clerks and typists are of course not necessary to the successful functioning of the marriage relation.

For the same reason, those decisions relied upon by petitioner which hold that a business man or merchant does not publish a libelous statement simply by dictating it to a stenographer are not in point. The *ratio decidendi* of these decisions was clearly explained by one of the judges in *Osborn* v. *Boulter* (C.A. 1930), 2 K.B., p. 226, 236 (cited by petitioner), when he said:

> I have come to the conclusion that no one could possibly say that at the present time or when this letter was written it was other than a reasonable and usual course of business for brewers and business people generally, instead of writing business letters in their own hand, to write them through the intermediary of a typist * * *.

It is not the usual or customary mode for the husband to utilize a stenographer in carrying on secret and private correspondence with his wife.

We think it is evident that whether the test to be applied is the law of Washington at the time Washington was admitted into the Union or the

weight of authority generally, petitioner's stenographer was competent to testify as to the contents of the letter in question.

## CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted.

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